BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
GTE Telephone Operating Companies	)	**CC Docket No. 98-79**
GTOC Tariff FCC No. 1	)	
GTOC Transmittal No. 1148	)	

COMMENTS OF THE

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

CHARLES D. GRAY
General Counsel

JAMES BRADFORD RAMSAY
Assistant General Counsel

National Association of
Regulatory Utility Commissioners

1100 Pennsylvania Ave, NW
Suite 608
Post Office Box 684
Washington, D.C. 20044-0684

(202) 898-2200

September 18, 1998

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
GTE Telephone Operating Companies	)	**CC Docket No. 98-79**
GTOC Tariff FCC No. 1	)	
GTOC Transmittal No. 1148	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following general comments in response to the Common Carrier Bureau's ("CCB") August 20, 1998 "Order Designating Issues for Investigation."

In this proceeding, the FCC has asked for comment on whether GTE's DSL tariff offering is jurisdictionally interstate. At a minimum, the FCC jurisdictional determination in this proceeding will influence the resolution of related issues in other proceedings pending before the FCC, several State Commissions, and at least one district court. NARUC respectfully requests that the FCC work cooperatively with the States, to consider under what circumstances and through what mechanisms this purportedly special access traffic may be treated as interstate, intrastate, or jurisdictionally mixed. In support of this request, NARUC offers the following comments:

I. BACKGROUND

On May 15, 1998, GTE filed Transmittal No. 1148 establishing a new offering, GTE DSL Solutions-ADSL Service, to become effective May 30, 1998 in portions of the following 14 States: California, Florida, Hawaii, Illinois, Indiana, Kentucky, Michigan, Missouri, North Carolina, Ohio, Oregon, Texas, Virginia, and Washington.

GTE describes its offering as an "interstate data special access service" that provides a high speed access connection between an end user subscriber and an Internet Service Provider ("ISP") by utilizing a combination of the subscriber's existing local exchange physical plant (i.e., copper facility), a specialized DSL-equipped wire center, and transport to the network interface, e.g. the frame relay switch, where the ISP will connect to GTE's network. The DSL service offering will enable the simultaneous transmission of voice dialed calls and high speed data access over a single path, thereby reducing the need for subscribers to obtain additional lines for their Internet access capabilities, according to GTE. On May 29, 1998, the CCB suspended the transmittal for one day and, subsequently, issued an order in August which posed the question: "whether GTE's DSL service offering constitutes an interstate access service and thus is subject to the Commission's jurisdiction." [1] The FCC has not previously addressed the lawfulness of a DSL service in the context of an interstate tariff such as that filed by GTE.

---

[1] The FCC's August Designation Order also askes if the FCC should defer to the states the tariffing of retail DSL services to lessen the possibility of a price squeeze.

II. COMMENTS

The FCC should work cooperatively and expeditiously with the States, to consider under what circumstances and through what mechanisms Internet traffic may be treated as interstate, intrastate, or jurisdictionally mixed.

NARUC's July 1998 resolution captioned "Reciprocal Compensation for Calls to ISPs" *specifically recognizes that any action the FCC takes with respect to this purportedly "special access" GTE tariff filing will*, at a minimum, influence numerous other pending and completed State and Federal proceedings. For example, if the FCC should find GTE's ADSL service is interstate, it is likely that some will argue that finding should also apply to dial-up ISP service. Indeed, at least one of NARUC's members has opened a docket to examine GTE's provisioning of ADSL services.

At the core of the CCB inquiry in this proceeding is the jurisdictional status of internet traffic. In related proceedings involving switched services, the FCC has been urged to find that calls to ISPs involving the exchange of traffic between carriers within the same local calling area are within the FCC's exclusive jurisdiction and outside of State responsibility under Section 252 of the Telecommunications Act of 1996.

However, court decisions to date support a determination that the States have regulatory oversight for these reciprocal compensation arrangements, including calls to ISPs, a fact that the FCC must consider in the course of resolving any interconnection proceedings. Indeed, a recent Texas district court decision addressed the question of the jurisdictional nature of such traffic by

stating "[a]s a matter of law, with respect to ISP traffic, this Court agrees with the PUC's finding that '[w]hen a transmission path is established between two subscribers in the same mandatory calling area, traffic carried on that path is local traffic, with the telecommunications service component of the call terminating at the ISP location.' PUC Order at 4." See, *Southwestern Bell Telephone Company v. Texas Public Utility Commission et al.*, MO-98-CAA3, Slip Opinion at 5 (W.D. Texas, Midland-Odessa Division June 4, 1998).

In a previous resolution, adopted at NARUC's 1997 Fall Meeting, we resolved that "at least as long as the FCC's current rule regarding ISP traffic remains in effect, such traffic should continue to be treated as subject to State jurisdiction in interconnection agreements or tariffs" and "be governed by the same legal authority of the applicable State commission that applies to all such interconnection agreements or tariffs." The more recent July resolution points out that at least 19 State commissions, *in proceedings where the jurisdictional status of the traffic was at issue*, have responsibly exercised jurisdiction with respect to the reciprocal compensation issue. Those decisions demonstrate that the States are adequately and appropriately carrying out their responsibilities in overseeing the provision of local telecommunications service in situations that involve new demands on local networks by ISPs.

The resolution makes clear that, at a minimum, with respect to agreements concerning reciprocal compensation obligations, State commissions are adequately positioned to fulfill the Act's intent and carriers should seek relief *at the State commissions*, rather than asking the FCC to upset the regulatory balance achieved in the Act by asserting federal jurisdiction. Indeed,

NARUC's resolution "holds that reciprocal compensation arrangements, including those for calls to ISPs, *are subject to State authority without the need for the FCC to intervene or otherwise act on this matter.*"

Finally, citing, *inter alia*, GTE's filing in this docket, the resolution specifically suggests that, to the extent "the broader issue of the jurisdictional treatment of Internet access over the public switched network" is implicated by an FCC determination, the FCC should work cooperatively and expeditiously with the States, to consider under what circumstances and through what mechanisms this traffic may be treated as interstate, intrastate, or jurisdictionally mixed.

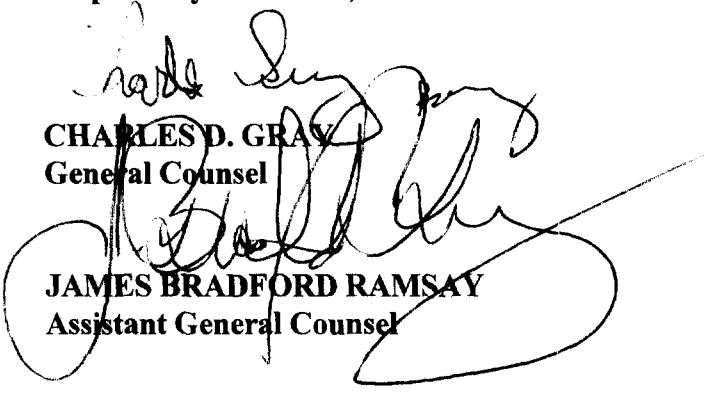
As it is clear the FCC's determination in this docket could have a significant impact on completed, current and future State (and federal) proceedings, NARUC's resolution *makes clear* that the FCC should carefully examine any State commission comments filed in this proceeding and also carefully examine the 21 State decisions addressing, either tangentially or directly, the jurisdictional status of internet traffic. To assist the Commission with this investigation, I have appended a list of most of the relevant State decisions and pleadings and, where possible, copies of the decisions/pleadings themselves. [2]

[2] Moreover, the tone and content of the resolution *suggest* the FCC should carefully investigate arguments proffered by others that (1) GTE's proposed tariff may be an attempt to forum shop to avoid 21 existing State decisions on the reciprocal compensation issue or generate legal precedent to collaterally attack those decisions, (2) an interstate tariff may result in price squeezes, and (3) a rulemaking proceeding may result in a better record as a basis for making such jurisdictional determinations which have potentially significant impacts.

III. CONCLUSION

NARUC respectfully requests the FCC carefully consider the forgoing before taking final action in this docket.

Respectfully submitted,



CHARLES D. GRAY
General Counsel

JAMES BRADFORD RAMSAY
Assistant General Counsel

National Association of
Regulatory Utility Commissioners

1100 Pennsylvania Avenue, Suite 608
Post Office Box 684
Washington, D.C. 20044

(202) 898-2200

September 18, 1998

APPENDIX A – NARUC'S JULY 1998 RESOLUTION

Reciprocal Compensation for Calls to ISPs

WHEREAS, The Federal Communications Commission ("FCC") has been urged to find that calls to Internet service providers ("ISPs") involving the exchange of traffic between carriers within the same local calling area are within the FCC's exclusive jurisdiction and outside of state responsibility under Section 252 of the Telecommunications Act of 1996; and

WHEREAS, The court decisions to date support that the states have regulatory oversight for these reciprocal compensation arrangements, including calls to ISPs, which must not be disregarded by the FCC in the course of resolving interconnection proceedings; and

WHEREAS, The National Association of Regulatory Commissioners ("NARUC") has previously adopted a resolution at its 1997 Fall Meeting that "at least as long as the FCC's current rule regarding ISP traffic remains in effect, such traffic should continue to be treated as subject to state jurisdiction in interconnection agreements or tariffs" and "be governed by the same legal authority of the applicable state commission that applies to all such interconnection agreements or tariffs;" and

WHEREAS, At least 19 state reciprocal compensation decisions demonstrate that the states are adequately and appropriately carrying out their responsibilities in overseeing the provision of local telecommunications service in situations that involve new demands on local networks by ISPs; and

WHEREAS, Carriers that have concerns about either the rates to be charged for any intrastate telecommunications service or compliance with any state regulations, should seek relief at the state commissions, rather than requesting the FCC to upset the regulatory balance achieved in the Act by asserting federal jurisdiction or otherwise intervening; and

WHEREAS, The broader issue of the jurisdictional treatment of Internet access over the public switched network (PSN) has arisen not only in reciprocal compensation disputes, but also in:

•SBC and GTE filings at the FCC to offer their xDSL services exclusively under interstate tariffs,

•Filings under S. 706 of the Act by Bell Atlantic Corp., Ameritech Corp. and US WEST Communications, Inc. for treatment of advanced services as unregulated or exempt from various sections of the Act,

•The NECA petition for freezing or averaging separations factors to avoid large year to year shifts due to Internet access traffic,

•The FCC's ongoing investigation of Internet usage over the PSN; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1998 Summer Meetings in Seattle, Washington, holds that reciprocal compensation arrangements, including those for calls to ISPs, are subject to state authority without the need for the FCC to intervene or otherwise act on this matter; and be it further

RESOLVED, That if the FCC intervenes regarding the broader jurisdictional issues of Internet access over the PSN, it should work cooperatively and expeditiously with the states, to consider under what circumstances and through what mechanisms this traffic may be treated as interstate, intrastate, or jurisdictionally mixed; and be it further

RESOLVED, That the NARUC General Counsel be directed to file and take any appropriate actions to further the intent of this resolution.

Sponsored by the Committee on Communications

Adopted July 29, 1998

APPENDIX B – LIST OF RELVANT STATE DECISIONS/PLEADINGS

1 ARIZONA – Attached.

Arizona Corporation Commission, Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Opinion and Order, Decision No. 59872, Ariz. CC Docket Nos. U-2752-96-362 and E-1051-96-362 (Oct. 29, 1996)

2. COLORADO – Attached.

Colorado Public Utilities Commission, *Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc.*, Decision Regarding Petition for Arbitration, Decision No. C96-1185, Co. PUC Docket No. 96A-287T (Nov. 5. 1996)

3. CONNECTICUT – Attached.

Connecticut Department of Public Utility Control, *Petition of the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Service Provider Traffic*, Final Decision, Conn. DPUC Docket No. 97-05-22 (Sept. 17, 1997)

4. FLORIDA – Attached.

Florida Public Service Commission, Complaint of World Technologies, Inc., Against BellSouth Corporation; No. 971478-TP (August 4, 1998, agenda meeting) -

5. ILLINOIS – Attached.

Illinois Commerce Commission, *Teleport Communications Group, Inc. v. Illinois Bell Telephone Company, Ameritech Illinois: Complaint as to Dispute over a Contract Definition*, Opinion and Order, Ill. CC Docket No. 97-0404 (Mar. 11, 1998)

6. MARYLAND – Attached.

Maryland Public Service Commission, Letter from Daniel P. Gahagan, Executive Secretary, to David K. Hall, Esq., Bell Atlantic – Maryland, Inc., Md. PSC Letter (Sept. 11, 1997)

7. **MICHIGAN – Attached.**

Michigan Public Service Commission, *Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc. and Ameritech Information Industry Services on Behalf of Ameritech Michigan*, Opinion and Order, Mich. PSC Case Nos. U-11178, U-111502, U-111522, U-111553 and U-111554 (Jan. 28, 1998)

8. **MINNESOTA**

➢ Minnesota Department of Public Service, *Consolidated Petitions of AT&T Communications of the MidWest, Inc., MCIMetro Access Transmission Services, Inc. and MFS Communications Company for Arbitration with U S West Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996,* Order Resolving Arbitration Issues, Minn. DPS Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Dec. 2, 1996)

9. **MISSOURI – Attached.**

Missouri Public Service Commission, *Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection with SWBT*, Case No. TC-98-278 (April 23, 1998).

10. NEW YORK – Attached.

New York Public Service Commission, *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Order Closing Proceeding, NY PSC Case No. 97-C-1275 (Mar. 19, 1998)

New York Public Service Commission, *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Order Denying Petition and Instituting Proceedings, NY PSC Case No. 97-C-1275 (July 17, 1998)

11. **NORTH CAROLINA – Attached.**

North Carolina Utilities Commission, *Interconnection Agreement between BellSouth Telecommunications, Inc. and US LEC of North Carolina, Inc.*, Order Concerning Reciprocal Compensation for ISP traffic, NC UC Docket No. P -55, SUB 1027 (Feb, 26, 1998)

North Carolina Response to BellSouth Motion for Stay and Referral to FCC, filed August 27, 1998 in BellSouth Telecommunications v. USLEC and NC Utilities Commission, Civil Action No: 3:98 CV 170 MV.

12. OHIO – Attached.

Public Utilities Commission of Ohio, *In the Matter of the Complaint of ICG Telecom Group, Inc.*, Opinion and Order, Case No. 97-1557-TP-CSS (August 27, 1998)

13. OKLAHOMA

Oklahoma Corporation Commission, *Application of Brooks Fiber Communications of Oklahoma, Inc., and Brooks Fiber Communications of Tulsa, Inc. for an Order Concerning Traffic Terminating to Internet Service Providers and Enforcing Compensation Provisions of the Interconnection Agreement with Southwestern Bell Telephone Company*, Okla. CC Cause No. PUD 970000548 (Feb. 5, 1998)

14. OREGON – Attached.

Oregon Public Utility Commission, *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996*, Decision, Or. PUC Order No. 96-324 (Dec. 9, 1996)

15. PENNSYLVANIA – Attached Recent Orders Opening Related Investigation

Pennsylvania Public Utility Commission, *Investigation of Issue of Local Telephone Number Telephone Numbers to Internet Service Providers Served by Competitive Local Exchange Carriers, Inc.*, P-00981404 (August 27, 1998). [and a related motion by Commissioner Wilson.]

Pennsylvania Public Utility Commission, *Petition for Declaratory Order of TCG Delaware Valley, Inc. for Clarification of Section 5.7.2 of its Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc.*, P-00971256 (June 2, 1998). – This order is not attached.

16. TENNESSEE

Tennessee Regulatory Authority, *Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Tenn. RA Docket No. 98-00118 (Apr. 21, 1998)

17. TEXAS – Attached.

Texas Public Utility Commission, *Complaint and Request for Expedited ruling of Time Warner Communications*, Order, Tex. PUC Docket No. 18082 (Feb. 27, 1998)

18. VIRGINIA – Attached.

Virginia State Corporation Commission, *Petition of Cox Virginia Telecom, Inc. for Enforcement of Interconnection Agreement with Bell-Atlantic-Virginia, Inc. and Arbitration Award for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers,* Final Order, Va. SCC Case No. PUC970069 (Oct. 24, 1997)

19. WASHINGTON – Attached.

Washington Utilities and Transportation Commission, *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and U S West Communications, Inc. Pursuant to 47 U.S.C. § 252,* Arbitrator's Report and Decision, Wash. UTC Docket No. UT-960323 (Nov. 8, 1996), aff'd *U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-22WD (W.D. Wash. Jan. 7, 1998

20. WEST VIRGINIA – Attached.

West Virginia Public Service Commission, *MCI Telecommunications Corporation Petition for Arbitration of Unresolved Issues for the Interconnection Negotiations Between MCI and Bell Atlantic – West Virginia, Inc.*, Order, WV PSC Case No. 97-1210-T-PC (Jan. 13, 1998)

21. **WISCONSIN – Attached.**

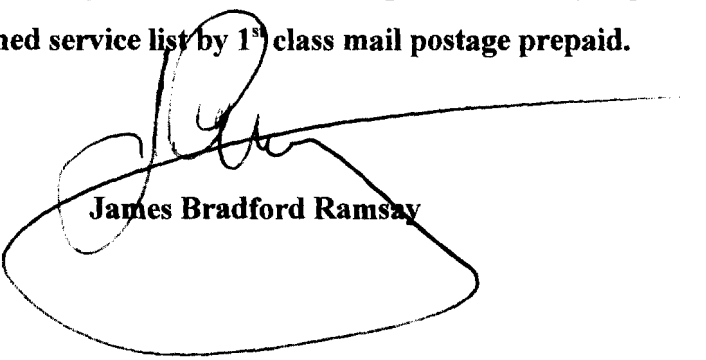
Wisconsin Public Service Commission, *Contractual Disputes About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG Milwaukee, Inc.*, 5837-TC-100 (May 13, 1998).[3]

THE TEXT OF THE DECISIONS/PLEADINGS INDICATED ABOVE FOLLOW:

[3] Two states have pending for final action hearing examiner recommendations finding that the calls are local -- Delaware and Georgia -- and the issue is involved in proceedings before at least five additional states in Alabama, Alaska, California, Indiana, and Kentucky.

Certificate of Service

I, James Bradford Ramsay, certify that I have served copies of the forgoing on all persons on the attached service list by 1st class mail postage prepaid.



James Bradford Ramsay

1

BEFORE THE ARIZONA CORPORATION COMMISSION

RENZ D. JENNINGS
CHAIRMAN
MARCIA WEEKS
COMMISSIONER
CARL J. KUNASEK
COMMISSIONER

DOCKETED

OCT 21 1996

DOCKETED BY

IN THE MATTER OF THE PETITION OF MFS COMMUNICATIONS COMPANY, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, AND CONDITIONS WITH U S WEST COMMUNICATIONS, INC., PURSUANT TO 47 U.S.C. § 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996.	DOCKET NO. U-2752-96-362 DOCKET NO. E-1051-96-362 DECISION NO. 59872 OPINION AND ORDER

DATES OF ARBITRATION: September 9 and 10, 1996

PLACE OF ARBITRATION: Phoenix, Arizona

PRESIDING ARBITRATORS: Jerry L. Rudibaugh, Barbara M. Behun and Scott S. Wakefi

APPEARANCES: Mr. Russell M. Blau, SWIDLER & BERLIN Chartered, attor on behalf of MFS Communications Company, Inc.; and

Mr. Gary L. Lane, Corporate Counsel, U S WEST, INC., and Timothy Berg, FENNEMORE CRAIG, attorneys, on behal U S WEST Communications, Inc.

BY THE COMMISSION:

On June 27, 1996, MFS Communications Company, Inc. ("MFS") filed with the Ari Corporation Commission ("Commission") a Petition for Arbitration of Interconnection Rates, Terms Conditions ("Petition") pursuant to 47 U.S.C.§ 252(b) of the Telecommunications Act of 1996 ("A On July 19, 1996, U S WEST Communications, Inc. ("U S WEST") filed its Response to the Pet By Procedural Order dated July 25, 1996, an arbitration was scheduled for September 9, 1996, Commission's offices in Phoenix. The arbitration was held as scheduled and the parties subm closing arguments in writing on September 20, 1996. On October 3, 1996, the parties submitted a Position Statement ("Statement"), which further narrowed the issues. The Statement consisted of a of the parties' Interconnection Agreement ("Agreement"), with the remaining disputed po highlighted, indicating each party's position and proposed contract language, where applicable issues resolved in this Decision are those which the parties indicated remain as of October 3, 19

switch. The network and switch have the scope of an end office. U S WEST would not receive the service equivalent of tandem functionality when it would hook up with MFS's network. The network provides no extra trunking or efficient service of an area. U S WEST does not save use of its tandem switch or reduce its capacity needs by use of MFS's switch.

We therefore agree with U S WEST that for the purposes of call termination, the initial MFS switch should be treated as an end office switch.

Enhanced service providers *(Page 12, V.D.1.e)*

U S WEST has requested insertion of the following paragraph as D.1.e. to the parties' Agreement:

> For purposes of call termination, this Agreement recognizes the unique status of traffic originated by and terminated to enhanced service providers. These parties have historically been subject to an access charge exemption by the FCC which permits the use of Basic Exchange Telecommunications Service as a substitute for switched access service. USWC[4] expects that the FCC will address this exemption in its forthcoming access charge reform proceeding. Until any such reform affecting enhanced service providers is accomplished, USWC believes it is appropriate to exempt traffic originated to and terminated by enhanced service providers from the reciprocal compensation arrangements of this Agreement.

MFS's position

MFS requested that U S WEST not be allowed to include the above language, stating that an attempt to treat traffic based on content would set a difficult and dangerous precedent.

U S WEST's position

U S WEST's position is included in the language of the proposed paragraph.

Commission's resolution

This item of dispute was not discussed at arbitration or in closing briefs. The Commission also must decide this issue solely based upon the positions taken in the Agreement.

The Commission will adopt the exemption permitted by the FCC. However, the Agreement should indicate that if and when the FCC modifies the access charge exemption, the Agreement will also be modified.

Late payment charge *(Page 17, V.K.7)*

MFS has requested the following language be included in the Agreement:

---

[4] The Agreement's abbreviation for U S WEST.

(2)

(Decision No. C96-1185)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE PETITION OF MFS COMMUNICATIONS COMPANY, INC., FOR ARBITRATION PURSUANT TO 47 U.S.C. § 252(b) OF INTERCONNECTION RATES, TERMS, AND CONDITIONS WITH U S WEST COMMUNICATIONS, INC.	)	DOCKET NO. 96A-287T

DECISION REGARDING PETITION FOR ARBITRATION

Mailed Date: November 8, 1996
Adopted Date: November 5, 1996

T A B L E O F C O N T E N T S

by USWC in the interim will be trued-up in the permanent rates. The Agreement shall not include any restrictions on the bundling of network elements to offer services, apart from any incorporated through the Interconnection Tariff, nor will we implement any residual charge as proposed by Staff and USWC at this time.

O. Application of Compensation Charges to Enhanced Services Traffic

1. MFS recommends that compensation charges should apply to all types of traffic. It argues that exceptions should not be created for enhanced services traffic. In its Joint Position Statement with MFS (Exhibit 68), USWC proposes that it is appropriate to exempt traffic originated and terminated by enhanced service providers from the reciprocal compensation arrangements of the interconnection agreement. However, as noted by MFS, USWC witnesses Wiseman and Johnson testified that USWC is not proposing differential treatment of traffic from enhanced service providers, such as Internet traffic. Staff recommends that compensation charges not be based on the content of traffic but on the applicable tariff for transport of such traffic. MFS notes that such a differentiation of traffic would be technically unworkable.

2. We have searched the Act and the FCC Interconnection Order and find no reference to this issue. We agree with the MFS and Staff position, that the Agreement should apply compensation charges to all types of traffic and exceptions shall not be created for enhanced services traffic.

STATE OF CONNECTICUT

3

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 97-05-22 PETITION OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FOR A DECLARATORY RULING CONCERNING INTERNET SERVICES PROVIDER TRAFFIC

September 17, 1997

By the following Commissioners:

Jack R. Goldberg
Glenn Arthur
John W. Betkoski, III

DECISION

TABLE OF CONTENTS

DECISION

I. INTRODUCTION

A. SUMMARY

The Southern New England Telephone Company (SNET) petitioned the Department of Public Utility Control (Department) requesting that the Department issue a Declaratory Ruling to the effect that the mutual compensation scheme developed in Docket No. 94-10-02 DPUC Investigation into the Unbundling of the Southern New England Telephone Company's Local Telecommunications Network -Reopened, does not apply to Internet Service Providers (ISP). SNET argues, inter alia that mutual compensation should not apply to ISP providers because to do so would give an unfair advantage to Competitive Local Exchange Carriers (CLECs), and that ISP traffic is not local in nature and should not be subject to local mutual compensation.

The Department solicited comments from interested parties. All those filing comments disagreed with SNET's arguments and conclude that ISP traffic should be subject to mutual compensation.

After consideration of the comments filed, the petition and the Decision in Docket No. 94-10-02, the Department has determined that ISP traffic should be subject to mutual compensation. Accordingly, SNET's petition is denied.

B. BACKGROUND OF THE PROCEEDING

By petition (Petition) dated May 27, 1997, the Southern New England Telephone Company (SNET or Company) requested that the Department of Public Utility Control (Department) issue a Declaratory Ruling that the January 16, 1997 Decision in Docket No. 94-10-02, DPUC Investigation into the Unbundling of the Southern New England Telephone Company's Local Telecommunications Network - Reopened, governing mutual or reciprocal compensation, does not apply to Internet Service Provider (ISP) traffic.

C. CONDUCT OF PROCEEDING

By Notice of Request for Written Comments (Request) dated June 13, 1997, all interested persons were given the opportunity to file with the Department written comments addressing the following issues:

1. Whether the Docket No. 94-10-02 Decision governing mutual compensation applies to Internet Service Provider (ISP) traffic.

2. Whether ISP traffic should be considered intrastate or interstate in nature.

3. Whether the costs for terminating ISP traffic would already be recovered prior to imposition of mutual compensation.

4. Whether ISP traffic is terminating traffic only.

5. Whether any particular group or individual is provided a competitive advantage by allowing mutual compensation for ISP traffic.

6. Other pertinent issues directly related to this Petition.[1]

The Department issued a draft Decision in this docket on August X, 1997. All participants were provided an opportunity to submit written exceptions to and oral arguments on the draft Decision.

II. SNET PETITION

SNET argues that ISP traffic is terminating only and does not fall within the traditional services mutual compensation was to address. SNET claims that the main assumption of mutual compensation is that originating and terminating usage would balance out between the carriers with any imbalance or difference in that traffic being periodically settled by a payment from one carrier to the other. According to SNET, since ISP traffic is terminating only, the competitive local exchange carrier (CLEC) serving that ISP would never have to compensate SNET. SNET maintains that telephone calls to ISPs do not terminate in the local access and transport area (LATA) where the ISP's facilities and data bases are located because these calls are carried across LATA boundaries over the Internet to locations beyond Connecticut. SNET concludes that ISP traffic, therefore, is not local, but is inherently interstate, interexchange traffic. Petition, pp. 4-6.

SNET also maintains that the Federal Communications Commission (FCC) has consistently viewed ISP traffic to be interstate in nature. While noting that mutual compensation is designed to compensate a terminating carrier for its costs in completing the calls, the Company states that, in the case of ISP traffic, Internet service providers compensate CLECs for serving the ISP through the rates charged the subscriber, or SNET subsidizes the CLEC's costs in providing service to the ISP, or both. SNET argues that allowing a carrier to be compensated through mutual compensation for the costs it is already recovering would be an unintended use of the Department's mutual compensation policy and would grant those carriers serving ISPs an unwarranted competitive advantage.

Additionally, SNET argues that subjecting ISP traffic to mutual compensation would require SNET to purchase additional interconnect trunks to the CLECs' switches. In this case, the Company claims that it would also be required to pay the CLEC for the termination of those ISP calls originated from a SNET local customer. SNET asserts that since this traffic is originating only, it would potentially be liable to pay compensation to those CLECs. Other significant costs include network investment for trunks, switch

---

[1] In response to the Request, the Department received comments from the following: America Online, Inc. (AOL); AT&T Communications of New England, Inc. (AT&T); Cablevision Lightpath (Lightpath); Cox Connecticut Telcom, LLC (Cox); MCI Telecommunications Corporation (MCI); MFS Intelenet of Connecticut, Inc. (MFSI); and Teleport Communications Group, Inc. (TCG, collectively, the Participants).

modules and facilities to route the ISP calls from SNET's originating end offices to its tandem that is interconnected to the CLEC.

The Company further states that ISP traffic, whether terminating to an ISP on SNET's network or on a CLEC's network, does not fall within the definition of the traditional services mutual compensation was to address. According to SNET, subjecting ISP traffic to the mutual compensation plan (Plan) adopted in the January 17, 1997 Decision in Docket No. 94-10-02, would allow terminating carriers serving ISPs to avail themselves of a loophole constituting a free ride.

In the event the Department determines that mutual compensation applies to ISP traffic, SNET states that the Decision in Docket No. 94-10-02 requires the Department to reconsider its mutual compensation policy because it provides the CLECs with an unfair advantage. SNET contends that if ISP traffic were included for mutual compensation purposes, it would be required to compensate the CLEC for the termination of that traffic. SNET also contends that since ISPs do not originate traffic, the CLEC would never have to compensate the Company with all compensation flowing in only one direction. The above comments can be found in the Petition, pp. 6-8.

III. PARTICIPANTS' POSITIONS

A. AOL

The Participants generally oppose SNET's Petition and recommend that the Department reject SNET's claims and deny its request for Declaratory Ruling. AOL Comments, p. 1; Cox Comments pp. 1, 3; MFSI Comments, p. 2; TCG Comments, p. 1. AOL states that the Department should deny the Petition and reaffirm that its mutual compensation rules apply to all traffic including ISP traffic. AOL Comments, p. 1. AOL opines that the Petition undermines the State's procompetitive policy and the mandates of the Telecommunications Act of 1996 (1996 Telcom Act) and is evidence of SNET's refusal to accept that it must transition from the "protected monopoly" environment to the new telecommunications era. In particular, SNET is attempting to undermine the CLEC's ability to save ISPs by attacking the Department and the 1996 Telcom Act's mutual compensation regime. According to AOL, if the Petition is adopted, CLECs would be denied compensation for local traffic terminated on their networks based upon the identity of the end user being called. Denial of compensation to CLECs for traffic terminating on their networks to ISP end users may result in discriminatory treatment of CLECs in comparison with adjacent ILECs.[2] AOL concludes that under this scenario, CLECs would be discouraged from marketing their services to ISP end users and all ISP traffic would be driven back to the ILEC because, without compensation, there is no incentive for CLECs

---

[2] SNET claims that its proposal to exempt ISP traffic from mutual compensation is not discriminatory because ISP traffic is not similar to any other type of traffic. In support of that argument, SNET maintains that ISP traffic is not local traffic, but is interstate in nature. SNET also maintains that ISP traffic is characterized by unusually long holding times, is not voice, but involves the transmission of data. Accordingly, SNET suggests that a Department finding that ISP traffic is not subject to mutual compensation would not discriminate against any particular segment of CLECs' end users. SNET Reply Comments, pp. 9 and 10.

to furnish service to ISPs. This would return SNET to the position of having a monopoly over ISP end users.

Lastly, AOL argues that SNET's attempt to persuade the Department not to apply its mutual compensation rules to the transport and termination of ISP traffic violates the prohibition in §202(a) of the 1996 Telcom Act and Conn. Gen. Stat. §16-247 against unjust and unreasonable discrimination towards ISPs and all other end users purchasing local service. AOL concludes that since numerous other businesses purchase the same type of service and use the network in the same manner as ISPs, the imposition of different pricing standards for ISP traffic would amount to unjust and unreasonable discrimination. Accordingly, AOL recommends that the Department reject SNET's Petition. The above positions can be found in AOL Comments, pp. 3-6.

B. AT&T

AT&T argues that ISPs exhibit many of the characteristics of other classes of local business customers and, therefore, ISP traffic should be treated as local traffic. According to AT&T, this traffic should be included in calculations of reciprocal compensation, allowing all LECs serving ISPs to take advantage of available market opportunities, which, in turn, would place downward pressure on ILEC access rates. AT&T contends that ISP traffic must be treated as intrastate traffic and ISP end users should be permitted to purchase local services as do other local business customers. AT&T states that for the Department to decide otherwise would be irrational and contrary to the FCC's rulings. AT&T Comments, pp. 1 and 2.

C. Cox

Cox asserts that the Petition is premised on factual errors requiring that SNET's claims be rejected.[3] In particular, Cox opines that SNET has assumed that ISPs will never use the Company to terminate their traffic. Cox disagrees with this assumption and notes that unless SNET has unilaterally chosen not to serve ISPs in violation of its public service responsibilities, there is no reason to believe the claimed imbalance will not change this environment. Cox also notes that nowhere has SNET claimed that it is not currently terminating ISP traffic itself or has it indicated the amount of this traffic. Cox also disagrees with SNET's claim that no party to Docket No. 94-10-02 envisioned application of mutual compensation to large volumes of Internet traffic. Cox states that SNET itself argued that Bill and Keep[4] was not appropriate given the likelihood of traffic imbalance. Additionally, Cox disagrees with SNET's claim that terminating carriers serving ISPs are availing themselves of a loophole that constitutes a free ride. According to Cox, the terminating carriers incur certain costs to terminate traffic that must be recovered from the carrier originating the traffic. Cox Comments, pp. 1 and 2.

Cox contends that there is no legal or technical basis under state or federal laws or regulations to indicate that ISP traffic is anything other than local traffic. Accordingly, Cox maintains that ISP traffic qualifies as local telecommunications traffic under mutual

---

[3] Lightpath concurs with Cox's comments. Lightpath 6/27/97 Letter to the Department, p. 1.

[4] A bill and keep arrangement, in its most simplistic form, means that traffic is exchanged between networks without any compensation among providers.

compensation agreements and the Department must reject the Petition and affirm that ISP traffic is subject to mutual compensation. Cox Comments, p. 3.

Moreover, Cox provides two reasons why local calls to ISPs cannot be classified as anything other than local traffic. First, an ISP is not a telecommunications carrier, but is a customer purchasing telephone service from a LEC or CLEC like any other customer. Secondly, Cox argues that a call is considered as being terminated or completed to a customer, irrespective of what that customer does with the call on its own network. Therefore, Cox asserts that the fact that an ISP may route the customer traffic to the source of the information for which the customer is paying the ISP is no basis for claiming that the traffic that originated as local and locally terminated at an end user (ISP) is anything other than local traffic. Cox Comments, pp. 5 and 6.

Lastly, Cox disagrees with SNET's claim that ISP traffic is only terminating traffic. Cox states that when a SNET customer originates a call to an ISP who is a customer of another LEC or CLEC, and that second carrier completes the call, the traffic that flows is both upstream (from the SNET customer) and downstream (to the SNET customer). Cox opines that the traffic is not only terminating to the ISP but also flows from the ISP to SNET's customers. Cox Comments, p. 7.

D. MCI

MCI maintains that ISP traffic should be considered intrastate in nature and the January 17, 1996 Decision in Docket No. 94-10-02 governing mutual compensation applies to ISP traffic. MCI asserts that no where in §251(b)(5) of the 1996 Telcom Act did Congress or in the FCC's First Report and Order, CC Docket No. 96-98 In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), was the application of reciprocal compensation obligations removed from any specific traffic that originates and terminates within a local area based upon the identity or usage characteristics of the individual end user. MCI argues that mutual compensation requirements imposed on all LECs are not eliminated by the fact that they charge their end user customers for local services provided to their customers. According to MCI, a call placed over the public switch network (PSN) is considered to be terminated when it is delivered to the telephone exchange service bearing the called telephone number. MCI states that as a communications service, a call is completed at that point, regardless of the identity or status of the called party. Therefore, a call to an ISP is terminated at the point it is delivered to the telephone exchange service purchased by the ISP. MCI Comments, pp. 2-7

MCI also argues that ISP traffic is not terminating only traffic, because ISPs have outbound usage. MCI contends that the relevant treatment of ISP traffic for purposes of intercarrier mutual compensation obligations does not depend on independent individual end users or their calling patterns because it is carrier traffic in the aggregate that determines mutual compensation. Additionally, MCI claims that no particular group or individual is provided a competitive advantage by allowing mutual compensation to ISP traffic. Lastly, MCI contends that the Petition is contrary to the January 10, 1997 Decision in Docket No. 96-09-09, Application of MCI Telecommunications Corporation for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, in which

the Department adopted the December 24, 1996 Final Arbitration Award, for an "Agreement for Network Interconnection and Resale between SNET and MCI (Agreement)." MCI asserts that no where in the Agreement is it provided that SNET may refuse to compensate it for terminating local traffic that originates on SNET's network by singling out specific recipients of local calls for exclusion from its mutual compensation obligations. According to MCI, SNET has improperly refused to treat ISP traffic as part of its mutual compensation arrangements with MCI.

MCI also claims that SNET will not pay compensation for the termination of ISP traffic over MCI's facilities based on the January 17, 1996 Decision in Docket No. 94-10-02. MCI states that SNET's position is factually and legally incorrect because the service in question is a type of service that would be included in the Plan. MCI also states that SNET's position is incorrect because the Plan does not provide for, or contemplate that, carriers can pick and choose which end users it wants to include under mutual compensation arrangements and which it would exclude. MCI argues that under the Plan, all types of local service customers of all interconnecting carriers are blended together, without exception. Moreover, MCI argues that SNET improperly assumes that MCI is overcompensated on the basis of one customer, without considering all payments taking into account network investment and total customer base. Further, MCI argues that SNET is legally incorrect in its claim that it is an inappropriate and unintended use of the Plan to include all local service customers in the determination of mutual compensation. According to MCI, the Plan expressly requires that all local service traffic be included under mutual compensation arrangements, making no distinctions among or between types of end users nor omitting any from the mutual compensation mix.

Lastly, MCI asserts that SNET's claim of network burdens due to ISP traffic are irrelevant and without merit. MCI opines that any such burdens may also be self-inflicted by SNET's own aggressive Internet access business and the increased use of second lines actively promoted by SNET. Accordingly, MCI requests that the Department direct SNET to include ISP traffic under mutual compensation arrangements pending the final resolution of this issue. The above positions can be found in MCI Comments, pp. 10-14.